Airport-Shuttle Cincinnati, Inc. *and* Soft Drink Drivers & Helpers, Vending Drivers & Allied Workers & Employees Local 152, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Case 9-CA-16344

August 25, 1981

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

Upon a charge filed on January 20, 1981, by Soft Drink Drivers & Helpers, Vending Drivers & Allied Workers & Employees Local 152, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein called the Union, and duly served on Airport-Shuttle Cincinnati, Inc., herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 9, issued a complaint on March 4, 1981, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge and complaint and notice of hearing before an administrative law judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on May 14, 1980, following a Board election in Case 9-RC-13149, the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate;[1] and that, commencing on or about December 11, 1980, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it do so. On March 13, 1981, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint, and raising an affirmative defense.

On March 31, 1981, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on April 7, 1981, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed a response to the Notice To Show Cause.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

In its answer to the complaint Respondent admits that the unit is appropriate and that the Union was certified as the collective-bargaining representative of the unit employees, but it denies that the Union has been and is the exclusive representative of the employees in the unit. Respondent admits that by letter received by Respondent on December 10, 1980, the Union requested collective bargaining with Respondent. It further admits that on or about December 11, 1980, it refused,[2] and continues to refuse, to bargain collectively in good faith with the Union as the exclusive collective-bargaining representative of the employees in the unit by refusing to recognize, to meet, or to negotiate with the Union with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment. Respondent denies that it violated Section 8(a)(1) and (5) of the Act. In its response to the Board's Notice To Show Cause Respondent asserts that it refused to bargain because there exists unusual circumstances which warrant a hearing, because the Board departed from official precedent in holding that the challenges to the ballots of employees Laura S. Reichert, Carolyn McNew, and Debra Strunk be sustained, and because the Board's certification of the Union was improper. Review of the record herein, including the record in Case 9-RC-13149, reveals that on or about December 6, 1979, Respondent and the Union entered into a Stipulation for Certification Upon Consent Election in a unit of all full-time and part-time employees of Respondent at and working out its location at the Greater Cincinnati Airport, Erlanger, Kentucky, including drivers, counter persons and maintenance persons, but excluding office clerical employees and all professional employees, guards and supervisors as defiend in the Act.

[1] Official notice is taken of the record in the representation proceeding, Case 9-RC-13149, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967), enfd. 388 F.2d 683 (4th Cir. 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enfd. 415 F.2d 26 (5th Cir. 1969); *Intertype Co.* v. *Penello*, 269 F.Supp. 573 (D.C.Va. 1967); *Follett Corp.*, 164 NLRB 378 (1967), enfd. 397 F.2d 91 (7th Cir. 1968); Sec. 9(d) of the NLRA, as amended.

[2] The complaint also alleged, and Respondent denied, that the Union requested bargaining on September 15, 1980. Respondent admitted that it refused to bargain on December 11, 1980, and in his Motion for Summary Judgment the General Counsel sets forth December 11, 1980, as the date of Respondent's refusal to bargain. Since Respondent admits that it refused to bargain on that date there is no factual issue as to when the violations occurred.

Subsequently, on December 20, 1979, the employees in the unit voted in an election for the purpose of selecting a collective-bargaining representative. The tally of ballots showed 18 votes cast for, and 17 cast against, the Union, and 4 challenged ballots, a sufficient number to affect the results of the election. On December 31, 1979, the Union filed timely objections to conduct affecting the results of the election, alleging in substance that Respondent interfered with the employees' free choice in the election. On February 6, 1980, the Regional Director issued a "Report on Challenged Ballots, Objections to Election and Recommendations" to the Board wherein, *inter alia*, he approved the Union's request to withdraw the objections in their entirety. At the same time, the Regional Director recommended that the four challenged ballots he sustained, that they not be opened and counted, and that the Union be certified. On May 14, 1980, the Board found no merit in Respondent's exceptions to the Regional Director's recommendations to sustain the challenges to the ballots of Reichert, McNew, and Strunk, and to certify the Union as the exclusive bargaining representative of all the employees in the unit.[3] By letter received by Respondent on December 10, 1980, the Union requested Respondent to bargain. On December 11, 1980, and at all times thereafter, Respondent admittedly has refused, and continues to refuse, to recognize and to bargain collectively in good faith with the Union as the exclusive collective-bargaining representative of the employees in the unit.

It is well settled that in the absence of newly discovered or previously unvailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.[4]

In its brief in opposition to the Motion for Summary Judgment Respondent contends for the first time that "unusual circumstances" exist which warrant its refusal to bargain, or alternatively a hearing in this proceeding. Respondent asserts that a "disaffection" petition signed by 70 percent of the unit employees and the Union's "total inactivity" following the election in December 1979 and the certification in May 1980 constitute the "unusual circumstances." Respondent also asserts that the Union rendered no apparent input or assistance to employees who filed unfair labor practice charges in June and July 1980,[5] and that Respondent was not informed of the appointment of a steward, any grievances, potential strikes, or handbilling and received no wage demands from the Union. Respondent further asserts that there "appears to be other factual issues based upon other facts which can only be presented at a hearing."

We find no merit in Respondent's contention that it has no obligation to bargain with the Union because a majority of the unit employees allegedly signed a disaffection petition indicating dissatisfaction with the Union. It is well settled that absent unusual circumstances an employer is required to honor a certification for a period of 1 year.[6] Employee disenchantment with the certified representative during the certification year does not excuse an employer from its obligation to bargain during the certification year, absent unusual circumstances. The fact that the Union may not have contacted Respondent until December 10, 1980, following its certification on May 14, 1980, is not such an "unusual circumstance."[7] Respondent also asserts that there are other facts which warrant a hearing, but it does not state what those facts are, nor has it proffered any evidence to warrant a hearing. Accordingly, we find no merit in Respondent's affirmative defense.

All other issues raised by Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. Accordingly, we grant the Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent, a Delaware corporation, is engaged in ground transportation at its location at the Greater Cincinnati Airport, Erlanger, Kentucky. During the past 12 months, a representative period, Respondent had a gross volume of business in excess of $250,000. During the same period of time, Respondent purchased and received goods and ma-

[3] In the absence of exceptions the Board adopted, *pro forma*, the Regional Director's recommendation to sustain the challenge to the ballot of Silas George Sharp.

[4] See *Pittsburgh Plate Glass Co.* v. *N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

[5] Respondent implies that it has no knowledge of this "inactivity." In any event its knowledge or lack of knowledge of input or assistance by the Union in the filing of charges by employees is completely irrelevant to the issue of whether it violated Sec. 8(a)(5) of the Act.

[6] *Brooks* v. *N.L.R.B.*, 348 U.S. 96 (1954), and cases cited therein.

[7] *Ibid.*

terials valued in excess of $50,000 which were shipped to its Erlanger, Kentucky, facility directly from points outisde the State of Kentucky.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

Soft Drink Drivers & Helpers, Vending Drivers & Allied Workers & Employees Local 152, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *The Representation Proceeding*

1. The unit

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All full-time and part-time employees of Respondent at and working out of its location at the Greater Cincinnati Airport, Erlanger, Kentucky, including drivers, counter persons and maintenance persons, but excluding office clerical employees and all professional employees, guards and supervisors as defined in the Act.

2. The certification

On December 20, 1979, a majority of the employees of Respondent in said unit, in a secret-ballot election conducted under the supervision of the Regional Director for Region 9, designated the Union as their representative for the purpose of collective bargaining with Respondent.

The Union was certified as the collective-bargaining representative of the employees in said unit on May 14, 1980, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. *The Request To Bargain and Respondent's Refusal*

Commencing on or about December 10, 1980, and at all times thereafter, the Union has requested Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about December 11, 1980, and continuing at all times thereafter to date, Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that Respondent has, since December 11, 1980, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Airport-Shuttle Cincinnati, Inc., set forth in section III, above, occuring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817; *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

CONCLUSIONS OF LAW

1. Airport-Shuttle Cincinnati, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Soft Drink Drivers & Helpers, Vending Drivers & Allied Workers & Employees Local 152, affiliated with International Brotherhood of Teamsters, Chauffuers, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

3. All full-time and part-time employees of Respondent at and working out of its location at the Greater Cincinnati Airport, Erlanger, Kentucky, including drivers, counter persons and maintenance persons, but exlcuding office clerical employees and all professional employees, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since May 14, 1980, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about December 11, 1980, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Airport-Shuttle Cincinnati, Inc., Erlanger, Kentucky, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Soft Drink Drivers & Helpers, Vending Drivers & Allied Workers & Employees Local 152, affiliated with International Brotherhood of Teamsters, Chauffuers, Warehousemen and Helpers of America, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All full-time and part-time employees of Respondent at and working out of its location at the Greater Cincinnati Airport, Erlanger, Kentucky, including drivers, counter persons and maintenance persons, but excluding office clerical employees and all professional employees, guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its facility in Erlanger, Kentucky, copies of the attached notice marked "Appendix."[8] Copies of said notice, on forms provided by the Regional Director for Region 9, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 9, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

[8] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Soft Drink Drivers & Helpers, Vending

Drivers & Allied Workers & Employees Local 152, affiliated with International Brotherhood of Teamsters, Chauffuers, Warehousemen and Helpers of America, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreeement. The bargaining unit is:

All full-time and part-time employees of the Employer at and working our of its location at the Greater Cincinnati Airport, Erlanger, Kentucky, including drivers, counter persons and maintenance persons, but excluding office clerical employees and all profesional employees, guards and supervisors as defined in the Act.

AIRPORT-SHUTTLE CINCINNATI, INC.